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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES OF AMERICA,

Petitioner,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Claims

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BRIEF FOR THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY IN OPPOSITION

OPINION BELOW.

The Court of Claims opinion in this case is reported at 455 F. 2d 993. (Pet. App. 1a-80a)

JURISDICTION.

The decision of the Court of Claims was issued February 18, 1972. A petition for a writ of certiorari was filed on July 17, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1255(1).

QUESTION PRESENTED.

Whether respondent railroad is entitled to depreciation deductions for certain safety facilities at rail-highway intersections purchased from the proceeds of contributions to the capital of respondent made by Federal and State Governments.

STATUTES INVOLVED.

The pertinent statutory provisions are set forth in the Petition. (pp. 2-4)

STATEMENT.

Prior to June 22, 1954, certain facilities were contributed to respondent railroad by various governmental bodies. Specifically, such facilities consisted of railroad underpasses, overpasses, and railroad-highway crossing protection devices. These facilities were thereafter, up to and including the tax year here involved (1955), property used in respondent railroad's trade or business, and were property of the type which ordinarily would be acquired through capital expenditures, i.e., property with a useful life in respondent's business in excess of the remainder of the year of acquisition, and were of a character normally subject to the allowance for depreciation.

The aggregate cost of the facilities paid out of public funds with respect to which respondent now seeks to take depreciation was $2,146,140.

As indicated in Finding 9 of the Court below, the facilities were constructed primarily for the benefit of the public to improve safety and to expedite highway traffic flow. Respondent, however, received benefits from the facilities, among others, probably lower accident rates, reduced expenses of operating crossing facilities, and, where permitted, higher train speed limits, all of which permitted respondent to function more efficiently and presumably less expensively. The decision regarding what facilities to build and where to buld them was made after negotiation between the respective States and respondent. Factors considered included the accident statistics of the crossing points and the need for improved motor-vehicle traffic flow. On projects done in the 1930's, there was also considered how many men could be put to work on a project, since the principal goal of the Federal Government in giving financial support was to make work for persons unemployed during the economic depression. Another purpose of Federal financing was to curtail long-standing disputes between the States and railroads concerning the pro rata share each would pay for construction and improvement of such facilities. (Pet. App. 57a)

Finding 8(b) of the Court below indicates that respondent was obligated to maintain and replace all of these safety facilities at its own expense. It is obvious that the life of highways and consequently overpasses and underpasses is of an indefinite duration, as long as they are properly maintained. Therefore, the railroad obligation of maintenance, standing alone, is practically equivalent to replacement.

Respondent initiated this suit in the Court of Claims regarding several issues of alleged overpayment of its 1955 income tax. Included in these claims was the issue regarding the deductibility for depreciation on the safety facilities at issue before this Court. The Trial Commissioner and a majority of the Court of Claims held that respondent was entitled to include in its depreciation basis the entire amounts paid for or reimbursed pursuant to the capital contributions made by the Government to respondent.

The Court of Claims concluded that the rationale of this Court's decisions in *Brown Shoe* v. *Commissioner*, 339 U.S. 583, and *Edwards* v. *Cuba R.R.*, 268 U.S. 628, rather than *Detroit Edison* v. *Commissioner*, 319 U.S. 98, were controlling. (Pet. App. 7a)

Petitioner also had alleged that respondent had agreed in a "terms letter" to exclude this property from its depreciable base. However, as noted in Findings 10(a) and (b) of the court below, plaintiff had conditioned its acceptance of the "terms letter" without objection by the Internal Revenue Service. Respondent's condition to execution of the terms letter provided that "in the event that if any of the terms and conditions stated in said letter should be changed by statutory amendment, by operation of law, or otherwise," respondent would not be precluded "from the benefits of any such changes regardless of the acceptance herein contained." The lower court properly held that this court's decision in *Brown Shoe, supra,* distinguishing the case of *Detroit Edison, supra,* and holding that certain donated property could be added to the depreciable base produced such a change in the conditions of the terms letter and respondent is entitled to the benefits thereof. (Pet. App. 10a) Further, the reference to Mimeograph 58 was not included in the terms letter furnished respondent. (Pet. App. 58a)

ARGUMENT.

The decision below is correct in result.

1. The decision below is not in conflict with decisions of this Court. Nor is there any conflict between this decision of the Court of Claims and any other court.

As recognized by the Court of Claims, the facts of this case are more analogous to the rationale of this Court's decisions in *Brown Shoe Co.* v. *Commissioner, supra,* and *Edwards* v. *Cuba RR., supra,* than this Court's decision in *Detroit Edison* v. *Commissioner, supra,* and the rationale of *Brown Shoe* is controlling in the instant case.

The facts in the *Detroit Edison* case indicated that potential customers were required to make a deposit to defray the cost of the necessary construction of electric transmission lines when the public utility had concluded that the proposed service would be a marginal or loss operation. Detroit Edison Company contended that the deposits were capital contributions by a non-stockholder invested in a depreciable capital asset owned by the taxpayer, and, as such, subject to depreciation deductions. The government contended that the public utility had no investment in that portion of the assets constructed with the deposit funds and, thus, had no depreciable tax basis with respect thereto.

The key to this court's decision in the *Detroit Edison* case is found in the following language at pages 102 and 103 of the opinion:

> 'The customer payments so far as in question found their way into the Company's capital accounts

by way of an addition to surplus. Their interdependency with the increases in property accounts caused by the construction they induced justified the Commissioner in relating the one to the other for the purpose of adjusting the basis for depreciation.

"The Company, however, seeks to avoid this result by the contention that what it has obtained are gifts to it or contributions to its capital of the property paid for by the customer, and that therefore by the provisions of Sec. 113(a)(2) and (8)(B) it takes the basis of the donor or transferor. It is enough to say that it overtaxes the imagination to regard the farmers and other customers who furnished these funds as makers either of donations or contributions to the Company. The transaction neither in form nor in substance bore such a semblance.

"*The payments were to the customer the price of the service.* The receipts have gone, so far as here involved, to add to the Company's surplus." (emphasis added).

The crucial fact in the *Detroit Edison* case was the unassailed assumption that the deposits were made to obtain goods, services or privileges and not to increase the capital of the corporation.

Seven years later, in 1950, this court issued its decision in the *Brown Shoe* case. In *Brown Shoe,* the company had been allowed depreciation deductions on capital assets acquired in part through the use of funds donated by various communities desirous of inducing such industry to locate in their community. Subsequent to this Court's decision in the *Detroit Edison* case the Commissioner of Internal Revenue commenced to disallow depreciation with respect to that portion of the investment in such assets represented by the contributions made by these political subdivisions.

In the *Brown Shoe* case the government relied upon its view of the scope of this court's decision in the *Detroit Edison* case. It asserted that only the taxpayer's investment could be depreciated for tax purposes.

This court conclusively defined the law in this area and narrowly restricted the scope of the *Detroit Edison* case in the following language found at page 591 of its opinion:

> "• • • We do not consider that case controlling on the issue whether contributions to capital are involved here. Because in the *Detroit Edison* case 'The payments were to the customer the price of the service,' the Court concluded that 'it overtaxes imagination to regard the farmers and other customers who furnished these funds as makers either of donations or contributions to the Company.' Since in this case there are neither customers nor payments for service, we may infer a different purpose in the transactions between petition and the community groups. The contributions to petitioner were provided by citizens of the respective communities who neither sought nor could have anticipated any direct service or recompense whatever, their only expectation being that such contributions might prove advantageous to the community at large. Under these circumstances the transfers manifested a definite purpose to enlarge the working capital of the company."

Certainly these payments to the respondent at issue in this proceeding were not for any services rendered or to be rendered. Although the primary purpose of the Highway Act was to benefit the public by improving safety and expediting traffic flow it also had a direct effect on railroad operations as found by the court below in its finding No. 9. (Pet. App. 57a). Indeed, but for the capital limitations of railroads they would eliminate

all highway grade crossings in order to achieve a more economic and efficient operation.

Therefore, on balance, the expenditures at issue did prove advantageous to the community at large as well as enlarging the working capital of this respondent. This, of course, is the precise standard applied by this court in *Brown Shoe* permitting depreciation of such contributions to capital.

Although petitioner on page 14 of its petition asserts that respondent had no right to depreciate assets contributed by the government, such theory was obviously rejected by this court in the *Brown Shoe* case. Further, the case of *Helvering* v. *Lazarus & Co.*, 308 U.S. 252, cited by petitioner, specifically holds that depreciation deductions go to the party which "bears the burden of wear and exhaustion of business property", irrespective of who may have legal title or who originally furnished the consideration.

2. Although petitioner asserts that the decision below has great significance in regard to interpretation of the tax laws and that it would have a severe adverse impact on the revenues, such assertions are negated by an analysis of the facts involved.

In fact, this case has very isolated significance since Section 362(c)(1) of the Internal Revenue Code of 1954 provides a zero basis for property acquired by a corporation, on or after June 22, 1954, by means of a contribution to capital. Thus, for over eighteen years the Internal Revenue Code has codified the rule sought by the petitioner, but, by its own terms the statute is made inapplicable to the property at issue in this case, which was acquired prior to June 22, 1954.

As stated in the Committee Reports, the purpose of Section 362(c) was to provide rules:

> "respecting situations similar to that which occurred in *Brown Shoe Company* v. *Commissioner* (39 U.S. 583, 70 S. Ct. 820), a striking recognition of the unequivocal result of the application of such case, Paragraph (1) of subsection (c) provides that in such a case, if property, other than money, is acquired by a corporation after June 22, 1954, as a contribution to capital and is not contributed by a shareholder as such, then the basis of such property to the corporation shall be zero." (Senate Report No. 1622, 83rd Congress, 2nd Session, 1954 U.S. Code, Cong. and Admn. News, p. 4910.)

Rule 19 of this Court requires "special and important reasons" as the basis for this Court's exercise of its discretionary power of review upon a writ of certiorari. This Court has recognized that "special and important reasons" imply a reach to a problem beyond the academic or episodic. Specifically, under analogous circumstances where a statute has made an issue moot or academic, the Court has consistently denied a writ of certiorari. *Rice* v. *Sioux City Cemetery*, 349 U.S. 70. In the *Rice* case the Court stated:

> "Had the statute been properly brought to our attention, and the case thereby put into proper focus, the case would have assumed such an isolated significance that it would hardly have been brought here in the first instance."(•) (at pp. 76-77)

(•) Cf. *District of Columbia* v. *Sweeney*, 310 U.S. 631, where certiorari was denied "in view of the fact that the tax is levied under a statute which has been repealed and the question is therefore not of public importance."

To support their position that "substantial revenues" are at issue petitioner can only refer to an "unpublished" statistical report and speculative assumptions by the Internal Revenue Service as to what percent of similar property might still be subject to litigation as to depreciability for future years. Indeed, petitioner concedes that many companies have never segregated similar governmental grants in their accounts. To make such a reconstruction some eighteen years after the fact would obviously be a practical impossibility.

In reference to petitioner's exaggerated estimate of the cost basis of property which might be involved in this issue, it should be noted that respondent has involved in this self-limiting issue a total depreciable base of only $2.1 million.

Therefore, respondent asserts that it would be a needless academic exercise to review the issue in this proceeding when Congressional action has effectively mooted the issue for over eighteen years.

3. Petitioner concedes that there is no present conflict of circuits in regard to this issue and speculates that none will ever arise. Respondent submits that petitioner is requesting this Court to exercise its discretionary power in regard to an isolated matter not involving a conflict between any of the subordinate courts.

4. Even petitioner concedes that the issue relating to the effect of the terms letter agreement between respondent and the Internal Revenue Service is not sufficient in and of itself to justify a petition for writ of certiorari. Only if the Court would decide to resolve the substantive depreciation issue does petitioner request review of the holding of the Court below in regard to the terms letter agreement.

CONCLUSION.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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